

Community Affairs Legislation Committee

**National Disability Insurance Scheme
Amendment Bill 2024**

Occupational Therapy Australia Submission

May 2024

Introduction

Occupational Therapy Australia (OTA) welcomes the opportunity to provide a submission to the Committee on the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No 1) Bill 2024 (NDIS Bill).

OTA is the professional association and peak representative body for occupational therapists in Australia. There are over 30,000 registered occupational therapists working across the Government, non-Government, private and community sectors in Australia¹. Occupational therapists are allied health professionals whose role is to enable their clients to engage in meaningful and productive activities.

Occupational therapists and the NDIS

Occupational therapy is a person-centred health profession concerned with promoting health and wellbeing through participation in occupation. Occupational therapists deliver therapeutic support services under the National Disability Insurance Scheme (NDIS), working with NDIS participants to enhance their ability to engage in the occupations (activities) they want, need, or are expected to do; or by modifying the occupation or the environment to better support their occupational engagement. Occupational therapists provide services across the lifespan and have a valuable role in supporting participants living with developmental disorders; physical, intellectual, chronic and/or progressive disability; and psychosocial disability.

Occupational therapists work in a diverse range of settings to deliver NDIS services, or support NDIS participants, including small, medium, and large private practice, rehabilitation settings, paediatric services, and community services.

Occupational therapists help to unlock the value of the NDIS by working with participants to identify goals and build participants' capacity to achieve these, by engaging them with appropriate supports and services that promote independence, social connection, economic participation and protect and sustain physical and mental health.

Occupational therapists working with NDIS participants deliver a range of services including:

- functional capacity assessments (a comprehensive assessment of a person's function across a range of daily activities and environments to help identify the supports they require);
- prescription and implementation of assistive technology and/or environmental modifications;
- positive behaviour support plans and interventions;
- disability-related chronic disease management;

¹ Occupational Therapy Board of Australia (2023) *Registrant data: Reporting period: 01 October 2023 to 31 December 2023*. Available online [here](#).

- driving assessments (delivered by specially trained occupational therapy driver assessors); and
- targeted, goal-focussed capacity building, for example, with activities of daily living (ADL).

Occupational therapists are highly skilled in assessing the degree to which a person's disability affects their level of function in daily tasks. Based on these assessments, occupational therapists make recommendations for, and then deliver, interventions that enhance and maintain an individual's functional capacity, and prescribe supports, aides and assistive technology that help everyday Australians live as engaged, valued, and contributing members of society.

For example, an occupational therapist may work with a participant to build their capacity to achieve their goal of living more independently, by working with them to build skills to use public transport on their own. Or they might conduct an assessment and help a person access assistive technology like an electric wheelchair, and work with them to learn how to use this so they can move around safely and independently.

Key issues

Occupational therapists are a key service provider under the NDIS and OTA is concerned that the NDIS Bill includes fundamental scheme changes that risk limiting access to life changing occupational therapy supports. Additionally, OTA is concerned that the amendments proposed in the NDIS Bill will provide legal avenues that may lead to the reduction in access, and choice and control, for NDIS participants. These concerns and risks are highlighted below in response to specific legislative provisions, and a number of amendments are proposed.

Uncertain NDIS reform pathway

Firstly, OTA notes that Government is yet to respond to the Final Report of the Independent NDIS Review, which was published on 7 December 2023. It is typical for Government to provide a response to an independent review to signal its intention and approach to deliver reforms. This provides the opportunity for both Parliament and the public to understand the overall approach and intent that Government has committed to.

The NDIS Bill proposes to change legislative provisions that clarify scheme access, the types of supports that can be accessed, and the manner in which participants' needs are assessed and met. The Bill's Explanatory Memorandum notes that it is intended that NDIS Rules will be developed following legislative passage and that these will further clarify and provide detail on the scope and approach.

This is concerning because this will leave key details that will affect participant access to the decision making of key ministers, rather than national parliamentary scrutiny. OTA is concerned that there is not sufficient clarity about the overall approach that government will take to reform the NDIS, including the number of people who may be diverted into early intervention pathways, or onto foundational supports, when they are established, and the types of services and supports that will be offered as part of this new approach.

Recommendation 1: Passage of the NDIS Bill is paused until the Federal Government provides a fulsome response to the NDIS Review and Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, so that participants, their families, advocates, and support providers can understand the proposed reforms as an entire reform proposal, and then understand how these legislative changes will actually impact participants in terms of the services and supports they can access under new reforms.

Inadequate data and modelling

There is a risk that in supporting amendments which enable diversion away from individual NDIS plans and supports, this will lead to reduced or unequal access for people with disability, with serious consequences. For example, diversion into services that are of a lesser quality, or do not provide adequate access to therapeutic capacity building supports, may mean that people with disability lose access, and may also experience a resulting decline in individual capacity and function. For example, an individual who previously qualified for an NDIS plan and was able to receive therapeutic supports to assist with building independence in travel and employment seeking, may not receive these at the level or intensity required to achieve this goal, with a resulting economic loss through inability to participate in employment or build capacity. Even more significantly, health, wellbeing, and safety impacts on people with disability could be extremely serious if supports are restricted.

There is also a need for adequate data and economic modelling to understand the impacts of the Bill on the NDIS provider market. The introduction of the NDIS 10 years ago had a profound effect on the provider market, and the NDIS Independent Review found that the NDIS market has not grown and matured as anticipated. Now further substantial reforms are proposed, and OTA is concerned that the creation of early intervention supports and foundational supports, which we understand may be delivered through block funding and tender based arrangements, is a move away from the fee for service, individual choice and control approach that the current market supplies.

Coupled with the Bill's potential ability to further curtail the supply of certain services through the making of NDIS Rules that may restrict the types of services that may be accessed, and the classes of participants who may access them, it is important that accurate data about the scale, scope and economic impact of these changes are appropriately presented to the Australian public and the Parliament before substantial amendments are made to the NDIS Act.

Recommendation 2: Before progressing the NDIS Bill, that Government undertakes comprehensive economic modelling of the economic impacts of the proposed reforms, including:

- **Impact on participants including:**
 - **projected number of participants who will be diverted into early intervention pathways or foundational supports;**
 - **the projected efficacy of these supports in assisting people to build personal capacity, including social and economic participation;**

- any shortfall or losses that will be experienced by people with disability through reduced access to capacity building supports.
- **Impact on NDIS providers including estimated market impacts from changes to NDIS services that may:**
 - reduce supply of services from certain providers;
 - reduce the supply of providers to certain cohorts of participants;
 - reduce the supply of providers to those in regional and rural areas.

Possible scheme exclusion

Frequent references throughout the Bill to 'classes of participants' for example in provisions 10 (b and c) which allow for creation of NDIS Rules that can allow or deny specific supports to certain classes of participants, also raise concerns about the Bill enabling the creation of NDIS Rules that can unilaterally deny access to certain NDIS supports to certain cohorts of participants. OTA is concerned that this creates potential legislative pathways to further reduce the scope and size of the scheme in the future, based on economic conditions rather than the needs of persons with disabilities. The Bill's Explanatory Memorandum refers to classes of participants only in the context of transitioning people onto new NDIS plans and is silent on other ways in which they may be defined and for what future purposes.

In addition, while the scheme is intended to provide for people with lifelong disabilities, in practice, participants appear to be shifted away from their NDIS funding towards aged care funding as they age or move into residential aged care settings, resulting in reduced access to supports.

Recommendation 3: The Committee should seek further advice from Government on exactly what is envisaged in the future definition of classes of participants, to ensure that it is not inadvertently creating a legislative power that will be used without parliamentary scrutiny, to totally exclude certain people with disabilities from the NDIS in the future.

Changes to NDIS supports

The Bill creates a new definition of NDIS supports (provision 10) and indicates that NDIS Rules will be established in time that will provide further clarification of what will, and will not be allowed as an NDIS Support.

This creates risk in limiting the types of supports and services that a participant may need to access to live independently. This includes the types of supports an occupational therapists may prescribe or recommend to assist a person to live more independently.

Occupational therapists may prescribe a wide range of aides and equipment to assist a person to achieve their goals. This can range from simple items, used in specific contexts to assist a person, such as the use of plastic straws to aid with drinking, or installation of automatic soap dispensers in bathrooms to reduce the need to handle a bar of soap or round shampoo bottles (among hundreds of other examples).

The Bill's definition of NDIS supports includes a range of supports that provides broad guidance of what can and can't be paid for out of an NDIA plan. However, this also includes an ability to make NDIS Rules that will explicitly state what is not an NDIS Support (provision 10c).

The Explanatory Memorandum states that this could include *“For example, things such as holidays, groceries, payment of utility bills, online gambling, perfume, cosmetics, standard household appliances and whitegoods will not qualify as NDIS supports.”*

OTA notes that there is significant risk of inadvertently increasing scheme costs by multilaterally excluding types of supports from NDIS Supports. For example, in some cases, standard household appliances or whitegoods may be recommended to assist a person with disability to undertake certain daily tasks such as cleaning or cooking, in a way that increases independence and reduces reliance on support workers or other persons.

The example below shows how a standard household appliance, when prescribed for a specific circumstance, can reduce scheme costs and increase participant independence:

I was working with a lady who had a rheumatoid condition. She was unable to bend to load her dishwasher, so had to rely on support workers multiple times per week to do this. She got a Comfort Lift dishwasher, where the shelf extends out and up (it isn't a disability-specific item, just a different type of dishwasher on the market). It allowed her to load and unload the dishwasher independently and she no longer needed support workers to do it for her. Cost was \$1300 for the dishwasher, which saved about 2 hours per week of support worker time. It would have only taken approximately 10 weeks for the dishwasher to be more cost effective than support workers in this situation, and if we consider the approximate lifespan of the dishwasher of 5 years, the cost saving is significant.

OTA is concerned that the signalled intention of this policy approach is already excluding certain types of equipment that is low cost and already being accessed appropriately under the current NDIS with support from occupational therapists. Furthermore, OTA is concerned that the introduction of specific exclusions from NDIS Supports will make it more difficult for those with complex support needs and multiple disabilities to have their needs met. It also unclear from the Applied Principles and Tables of Support, which is to be used until the Rules are developed, as to whether supports such as home and living supports, employment supports and psychosocial disability supports will be included as NDIS supports.

Recommendation 4: That the Committee recommends to Federal Government that the creation of NDIS Rules regarding NDIS supports occurs in consultation with allied health professionals, including occupational therapists, to ensure that they do not inadvertently exclude supports or services that are key to achieving participant independence and are appropriately funded by the NDIS.

Recommendation 5: That Section 10 of the Bill is amended to further align with the United Nations Convention on the Rights of People with Disability to also refer to 'new or emerging

technology' to ensure that these can also be considered in the context of appropriate NDIS supports.

Needs assessment and flexible budgets

The Bill introduces a new process for requiring an NDIS participant to undergo a needs assessment which will assist in the preparation of their budget and plan. OTA is keen to ensure that this new approach expressly implements the recommendations of the NDIS Independent Review, which set out some guidance for Government on the manner in which these should be conducted.

While it is noted that the needs assessment approach, process and tools may be appropriate to detail in NDIS Rules, which enables update over time based on the evolution of NDIS processes and best practice in disability research and supports, it is essential that the person undertaking this assessment is appropriately skilled and qualified. The Committee must refer to the previous experience of NDIA utilising unqualified and unskilled NDIA staff to interpret specialist assessments and reports to create NDIS plans, resulting in unsuitable, unsafe or inadequate plans that have required a high degree of review via the Administrative Appeals Tribunal.

There is a risk around the potential use of insufficiently skilled needs assessors, and a possible reliance on over-simplified assessment tools. Mandating the minimum skills and experience for the person conducting the needs assessment provides a level of assurance that this will be conducted by an appropriate person with adequate skills and experience. It is also important that the person conducting the assessment has the appropriate skillset for the specific assessment (for example, a professional skilled in physical disability should not be assessing someone with a psychosocial disability).

The NDIS Independent Review noted that allied health professionals are an appropriate workforce to deliver these new assessments and it is important that this intent is enacted clearly in legislation. The time required, level of expertise in the area of functional assessments, and the frequent need for on site assessment makes allied health professionals, and specifically occupational therapists, particularly appropriate to conduct needs assessments. Should needs assessments be funded via Medicare, as suggested in the Review, it is important that the item number is restricted to professionals with the relevant expertise and training, and includes occupational therapists. This is particularly relevant when the assessment is based on function rather than medical diagnosis.

Where insufficiently skilled needs assessors are employed, or insufficient opportunity is provided for the appropriate time and engagement needed to conduct a useful assessment, there is substantial risk of increasing scheme costs, not to mention increased risk to the participant arising from an inaccurate or misinterpreted assessment. An under skilled assessor will not have the ability to interpret assessment results correctly, and may also use an inappropriate assessment tool which will lead to significantly inaccurate assessments. A skilled assessor will also be able to determine where, for example, certain assistive technologies or capacity building therapies may be employed in the short term, to increase capacity and reduce costs in the longer term.

OTA is also concerned about the new legislative provision for flexible budgets. While acknowledging the intent of this is to allow greater flexibility in how participants can spend their budget, OTA believes

there are two risks with this approach. Firstly, it is unclear how overall budgets will be determined under the new approach, and whether the method will enable an accurate budget total to be determined. Secondly, there is a risk that this approach will have an unintended effect of increasing scheme costs overall by inadvertently reducing the capacity building outcomes of the NDIS. This may happen if a participant is put into a position where a tight budget means that they must prioritise daily supports over capacity building. Finally, the introduction of flexible budgets may introduce a substantially increased administrative burden and stress for some families, who may not be expert on the specific skills available from various NDIS providers. As a result, some participants may miss out on beneficial therapies. The Committee should take these risks into consideration.

Recommendation 6: The Committee recommends amendments of the Bill provision 32L (2) to specifically require that needs assessments are undertaken by appropriately skilled and qualified persons through the following amendment (underlined): “(2) *The assessment must be undertaken by an appropriately qualified person, using the assessment tool, and in accordance with any other requirements, determined under subsection (8).*” The Bill should also include a definition of “appropriately qualified person” that specifically requires this to be a person who has appropriate qualifications, skills and experience in assessing physical, neurological and psychosocial disability to understand functional needs and personal goals.

Need for review powers

It is not clear whether the provisions to enable a needs assessment are reviewable decisions under section 99 of the NDIS Act. This creates uncertainty about the ability for a participant to challenge a needs assessment that was conducted in a manner that was unsuitable or inappropriate. The Committee should seek to clarify whether a needs assessment is subject to review under the Bill.

Recommendation 7: That the Committee clarifies whether the Bill allows for appropriate internal and external review pathways for completed needs assessments, and replacement assessments.

Provision of information

The Bill introduces provisions to allow the CEO to request information from a participant or other person if the CEO is considering revoking a person’s status as a participant in the NDIS. OTA requests that the Committee consider recommending further checks and balances around this provision, including increased protections for people with complex disability where that disability may prevent them from responding to a request for information in the required timeframe, and agency responsibility to ensure suitable supports are in place should a participant’s status be revoked. Making this determination on the basis of the satisfaction of what is considered reasonable by the CEO may not provide sufficient checks and balances for participants.

The Committee must also ensure that a copy of participants’ needs assessment is provided to the participant. Currently the NDIS Bill only requires that this is provided to the NDIA CEO. Participants should be able to access a key piece of factual evidence that will be relied upon by NDIA in its decision making. The participant should receive a copy in an accessible format for their own records or to be able to provide this to service providers as background information to enable providers to get a fuller picture of the participant and their needs.

Recommendation 8: That the Committee recommends additional checks and balances be considered to mitigate risk for participants should their status be revoked.

Recommendation 9: That the Committee recommends amendment of the NDIS Bill so that a copy of participant's needs assessment report, or replacement assessment report, is made available to the participant as soon as is practicable after it has been completed.

Needs reassessment

The Bill also creates a power for the NDIS CEO to order a replacement assessment under section 32L (7). There are concerns that utilisation of this power may require frequent reassessment, that is stressful and potentially traumatising for a participant, or that this could be utilised to attempt to receive a reassessment that recommends reduced levels of supports or services in an effort to reduce NDIS costs.

Recommendation 10: The Committee recommends amendment to the NDIS Bil that requires additional legislated checks and balances to ensure that the power to order replacement assessments under 32(7) is not used inappropriately, including that:

- the NDIA must provide written notice to a participant (or in another accessible format) on their need for reassessment and the grounds on which this is justified;
- require that the need for reassessment is a reviewable decision;
- that the NDIS provides an opportunity for a participant to decline reassessment on reasonable grounds; and
- the review specifies a minimum time period to ensures that they are not conducted too frequently.

Contact

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